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Rusman bin Sulaiman v Public Prosecutor

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FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–62 OF 2011(B)
ARIFIN ZAKARIA CHIEF JUSTICE, ZULKEFLI CJ (MALAYA), ABDULL HAMID EMBONG, SURIYADI AND HASAN LAH FCJJ
4 MAY 2012

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Criminal Law — Murder — Appeal against conviction and sentence — Deceased found death in hotel room — Appellant convicted and sentence under s 302 of the Penal Code — Whether appellant's presence at hotel room established — Whether offence could fall under s 299 of the Penal Code — Whether appellant's acts fell under s 300(b) or (c) of the Penal Code — Whether High Court judge decided correctly in finding that prima facie case had been established — Whether appellant failed to cast any reasonable doubt on prosecution's case — Penal Code ss 300(b), (c) & 302

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This was an appeal by the appellant against the decision of the Court of Appeal in affirming the conviction and sentence passed by the trial court against the appellant for the offence of murder under s 302 of the Penal Code ('the Code'). The prosecution's case was that the deceased and the appellant who were lovers met in room 321 at Hotel Panmour Villa. In the said room, the appellant strangled the deceased with a towel and forcefully covered her mouth, causing her to fall into deep coma and slowly dying. The appellant then splashed petrol over the room and started a fire. He then left the room, went downstairs to the payment counter, paid the bill of the room, returned the only key to the room to SP8, and left the hotel. As testified by the pathological forensic expert ('SP28'), due to the smoke, the death of the deceased was hastened, she died of asphyxia with acute pulmonary oedema due to suffocation (fire-related). SP34 who headed the forensic team found outside the lift near room 321 a red plastic bag which contained Helix ('P3') container and a cigarette butt ('P23A'). At one of the steps near to the lift, SP34 found a plastic bottle cover that could fit P3 and near the said cover he found four cigarette butts but picked up only two ('P23B') for DNA profiling. The chemist found that the DNA profile of these two cigarette butts did not match the DNA of the appellant. In the present appeal, the appellant submitted that the non-recovery of the other two cigarette butts should be held against the prosecution. The appellant's only serious defence in the present case was his allegation that his wife ('SP5') had caused the death. SP5 testified that she handed over P3 to the appellant in front of the hotel and she denied any involvement in the murder of the deceased.

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Held, dismissing the appeal and affirming the conviction and sentence:

(1) Even without the cigarette butts, there was an abundance of evidence to establish the appellant's presence at the scene of the murder. With the prosecution establishing that the semen on the vagina of the deceased was that of the appellant, the prosecution had successfully established his presence in room 321 at the material time. The cigarette butt and P3 were at best corroborative evidence (see paras 13, 19 & 27).

(2) For the purpose of s 300(b) of the Code, the appellant ought to have known that by strangling the neck of the deceased with the towel or even covering her mouth with a pillow (ingredient of intention of causing such bodily injury), the deceased would suffocate and die (ingredient of likely to cause death of the deceased). The act of burning the room was sufficient to establish the required statutory intention under s 300(c) of the Code. The offence committed could not fall under s 299 of the Code because the scenario here was that the degree of risk to death was past that of being likely result but the most probable result, and the appellant knew death would ensue. The violent acts of the appellant therefore would fall under s 300(b) or (c) of the Code in that the prosecution had established that the appellant had committed culpable homicide amounting to murder (see paras 33–36).

(3) Even though the prosecution depended very much on circumstantial evidence, it had successfully adduced sufficient evidence through witnesses' testimony and physical evidence. The prosecution had established that the appellant had met the deceased at the hotel and had a sexual liaison there, and with the benefit of being the last person to be with her had strangled the deceased. He later started a fire in the room. The strangulation, asphyxia, and manner of her death were confirmed by SP28. Therefore, the learned judge had decided correctly that a prima facie case had been established thus justifying calling the defence (see para 36).

(4) The appellant's attempt to blame SP5 came out rather weakly as at the stage of the prosecution he never posed any question that could have implicated her directly to the murder. It was uncontroverted that SP5 had testified that she had never entered the hotel and at no stage of the appellant's evidence did he manage to rebut the evidence of the prosecution that he was the last person to see the deceased alive. Further, the appellant's admission that he started the fire unwittingly destroyed any semblance of a possible defence (see paras 39–41).

(5) On maximum evaluation of the evidence and with such overwhelming circumstantial evidence, the court found no error in the High Court's finding that the prosecution had established a case beyond reasonable

doubt against the appellant (see para 42). A

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu terhadap keputusan Mahkamah Rayuan dalam mengesahkan sabitan dan hukuman yang dijatuhkan oleh mahkamah bicara terhadap perayu bagi kesalahan membunuh di bawah s 302 Kanun Keseksaan ('Kanun'). Kes pendakwaan adalah bahawa si mati dan perayu yang merupakan pasangan kekasih bertemu di dalam bilik 321 di Hotel Panmour Villa. Di dalam bilik tersebut, perayu menjerut leher si mati dengan tuala dan menutup mulutnya dengan kuat, menyebabkan dia koma dan perlahan-lahan mati. Perayu kemudian menyimbah petrol di dalam bilik dan menyalakan api. Dia kemudian meninggalkan bilik tersebut, turun ke kaunter pembayaran, membayar bil bilik tersebut, memulangkan satu-satunya kunci bilik kepada SP8, dan meninggalkan hotel. Seperti yang disahkan oleh ahli forensik patologi ('SP28'), disebabkan oleh asap, kematian si mati telah disegerakan, dia meninggal dunia akibat asfiksia dengan edema pulmonari akut disebabkan oleh kelemasan (berkaitan dengan kebakaran). SP34 yang mengetuai pasukan forensik menemui beg plastik merah yang mengandungi bekas Helix ('P3') dan puntung rokok ('P23A') di luar lif berdekatan bilik 321. Dalam jarak satu langkah dari lif tersebut, SP34 menemui penutup botol plastik yang boleh menutup P3 dan berhampiran penutup tersebut, dia menemui empat puntung rokok tetapi hanya mengambil dua ('P23B') untuk profil DNA. Ahli kimia mendapati bahawa profil DNA kedua-dua puntung rokok tersebut tidak sepadan dengan DNA perayu. Dalam rayuan semasa, perayu berhujah bahawa kegagalan mengambil dua puntung rokok yang lain harus diputuskan terhadap pendakwaan. Satu-satunya pembelaan perayu yang serius dalam kes ini adalah tuduhan bahawa isterinya ('SP5') telah menyebabkan kematian tersebut. SP5 memberi keterangan bahawa dia menyerahkan P3 kepada perayu di depan hotel dan dia menafikan sebarang penglibatan dalam pembunuhan si mati. B C D E F

Diputuskan, menolak rayuan dan mengekalkan sabitan dan hukuman: G

(1) Walaupun tanpa puntung rokok tersebut, terdapat keterangan-keterangan lain untuk membuktikan kehadiran perayu di tempat kejadian. Apabila pendakwaan membuktikan bahawa air mani pada faraj si mati adalah milik perayu, pihak pendakwaan berjaya membuktikan kehadiran perayu di dalam bilik 321 pada masa yang material. Puntung rokok dan P3 hanyalah keterangan sokongan (lihat perenggan 13, 19 & 27). H

(2) Bagi tujuan s 300(b) Kanun, perayu sepatutnya mengetahui bahawa dengan menjerut leher si mati dengan tuala atau menutup mulutnya dengan bantal (unsur niat untuk menyebabkan kecederaan tubuh badan), si mati akan lemas dan mati (unsur mungkin I

menyebabkan kematian si mati). Tindakan membakar bilik tersebut mencukupi untuk membuktikan niat statutori yang dikehendaki di bawah s 300(c) Kanun. Kesalahan yang dilakukan tidak boleh terangkum di bawah s 299 Kanun kerana senario di sini adalah bahawa tahap risiko kematian telah melampaui keputusan yang mungkin tetapi keputusan yang paling mungkin, dan perayu mengetahui kematian akan berlaku. Tindakan ganas perayu tersebut terangkum di bawah s 300(b) atau (c) Kanun di mana pendakwaan telah membuktikan bahawa perayu telah melakukan homisid salah yang berjumlah kepada pembunuhan (lihat perenggan 33–36).

(3) Walaupun pihak pendakwaan sangat bergantung pada keterangan sokongan, ia telah berjaya mengemukakan keterangan yang mencukupi melalui keterangan saksi dan bukti fizikal. Pihak pendakwaan telah membuktikan bahawa perayu telah bertemu dengan si mati di hotel tersebut dan melakukan hubungan seks di sana, dan sebagai orang terakhir yang bersama dengan si mati, perayu telah menjerut leher si mati. Dia kemudian menyalakan api di dalam bilik. Tindakan menjerut leher, asphyxia, dan cara kematian si mati disahkan oleh SP28. Oleh itu, hakim yang bijaksana telah memutuskan dengan tepat bahawa kes prima facie telah dibuktikan yang menjustifikasikan pembelaan dipanggil (lihat perenggan 36).

(4) Percubaan perayu untuk menyalahkan SP5 adalah agak lemah kerana pada peringkat kes pendakwaan, dia tidak pernah menimbulkan apa-apa persoalan yang boleh mengaitkan SP5 dengan pembunuhan tersebut. Ia tidak dapat dipertikaikan bahawa SP5 telah memberi keterangan bahawa dia tidak pernah memasuki hotel dan perayu gagal menyangkal keterangan pihak pendakwaan bahawa dia adalah orang terakhir yang melihat si mati masih hidup. Selanjutnya, pengakuan perayu bahawa dia yang menyalakan api secara tidak langsung memusnahkan apa-apa bentuk pembelaan yang mungkin (lihat perenggan 39–41).

(5) Di atas penilaian maksimum bukti dan dengan keterangan sokongan yang kukuh, mahkamah mendapati tiada kesilapan dalam keputusan Mahkamah Tinggi bahawa pihak pendakwaan telah membuktikan suatu kes melebihi keraguan munasabah terhadap perayu (lihat perenggan 42).]

Notes

For cases on appeal against conviction and sentence, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1870–1871.

Cases referred to

Abdul Aziz bin Lela v PP [2011] 5 MLJ 750; [2011] 7 CLJ 1, CA (distd)

Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1; [1996] 4 CLJ 597, FC (refd)
Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Chandmal And Anor v State of Rajasthan AIR 1976 SC 917, SC (refd)
Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)
Chung Kum Moey v PP [1967] 1 MLJ 205, PC (refd)
Hanafi bin Mat Hassan v PP [2006] 4 MLJ 134; [2006] 3 CLJ 269, CA (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 1 CLJ Rep 311, SC (refd)
Mohamed Ali v PP [1962] 1 MLJ 230 (refd)
PP v Hoo Chee Keong [1997] 4 MLJ 451; [1997] 2 CLJ Supp 357, HC (refd)
PP v Loo Seng Yip [2004] 8 CLJ 496, HC (refd)
R v Winner (1995) 79 A Crim R 528 (refd)
Ranwilage Suren Sanjeewa Fernando v PP [1998] 3 SLR (R) 269 (refd)
Syed Abu Bakar bin Ahmad v PP [1984] 2 MLJ 19, FC (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (refd)

Legislation referred to

Penal Code ss 299, 300, 300(b), (c), 302

Appeal from: Criminal Trial No B-05–50 of 2002 (High Court, Shah Alam)

M M Athimulan (MK Thas with him) (Athimulan & Co) for the appellant.
Ahmad bin Bache (Attorney Generals' Chambers) for the respondent.

Suriyadi FCJ (delivering judgment of the court):

[1] The appellant was charged at the High Court for murder under s 302 of the Penal Code and at the end of the trial was found guilty by the learned judge. He was accordingly sentenced to death. The Court of Appeal affirmed that decision thus causing the appellant to file an appeal to this court.

[2] The charge against the appellant is that he on 3 February 2002 at 11am in room 321 at Hotel Panmour Villa, 78, Leboh Turi, Off Persiaran Raja Muda Hassan, Taman Chi Liung, Klang, in the district of Klang, in the State of Negeri Selangor Darul Ehsan, had murdered Sheeren Liao Ee Chian ('the deceased'), under s 302 of the Penal Code and punishable under the same section. The case of the prosecution was based on circumstantial evidence as no one saw the appellant committing the offence against the deceased. In order to be successful in its prosecution based on circumstantial evidence the chain of evidence must be so complete as to point unerringly to the guilt of the appellant (*Chandmal And Anor v State of Rajasthan* AIR 1976 SC 917).

A **[3]** The brief case of the prosecution was that the deceased and the appellant who were lovers met in room 321 at Hotel Panmour Villa. In the course of the meeting on 3 February 2002, the appellant strangled her with a towel and also forcefully covered her mouth, causing her to fall into deep coma and slowly dying. In order to cover his tracks and misdeeds, he splashed petrol all over the B room, and started a fire. He then left the room, went downstairs to the payment counter, paid the bill of the room, returned the only key to the room, and left the hotel. Due to the smoke the death of the deceased was hastened. She died of asphyxia with acute pulmonary oedema due to suffocation (fire-related).

C **[4]** We now reproduce the flow of evidence adduced by the prosecution that led to a finding of a prima facie case by the learned judge. Sophia bt Raymond Bartholome (SP4), a friend of the deceased, was called to establish that on 1 January 2002 the latter had put up a night with her. The next day before leaving, the deceased informed her that she had been contacted by the D appellant who wanted to meet her. Even though she had never met the appellant before SP4 knew of their relationship.

[5] SP8, a hotel employee testified that on 2 February 2002 the deceased registered into room 321 of Hotel Panmour Villa. Only one room key was E issued to her. SP8 likewise confirmed the presence of the appellant at that hotel. On 3 February 2002, at about 9.30am the latter paid in full the balance of room 321's bill to him. SP8 also testified that in the course of paying for the room the appellant informed him that he was from room 321. Despite handing over a burnt slot key, the appellant never informed him of any fire, or that he F had left a person in that room. The appellant had placed the burnt key slot on the counter. SP8 added that the appellant appeared nervous and in a hurry.

[6] SP8, who is a neutral witness established the connecting piece of G evidence of the deceased having checked into room 321 of Hotel Panmour Villa a day before her death, and establishing the appellant's presence at that hotel on the day of her death. The information supplied to SP8 by the appellant that he came from room 321 is additional evidence of his access to it before handing over the key. His silence regarding how the key was burnt, and the act H of holding back an important piece of information of a person being left in the room, which turned out to be the deceased, must be held against him. A dead body, let alone burnt beyond recognition, not only will cut off any link of the deceased to him but also destroy any evidence of physical affliction on the body.

I **[7]** SP8's testimony of the appellant handing over a burnt slot key for that room, established the prosecution's case that the appellant had access, and was

present in room 321, when it was in flames. His nervous disposition as observed by SP8 merely piled up the evidence against the appellant.

[8] SP8 completed the picture when he supplied additional evidence of what happened after the appellant left, in that at about 11am of the same morning, the fire alarm of the hotel was triggered. He went up to room 321 and saw smoke seeping out of the door. On opening the door he found fire about to engulf the room; he even noticed that the air condition had been dislodged and had fallen on the floor. But he did not see anyone in the room. With the help of workers he extinguished the fire. When he returned to his station the appellant was nowhere to be seen. The fire being on the third floor, and it being extinguished before the arrival of the fire brigade, was confirmed by SP7 the hotel manager.

[9] SP36, the investigating officer, testified that he arrived at about 1pm in the room and discovered the deceased on the bed. He saw the deceased being covered with soot and found signs of burn marks on her legs and hands. He testified that he was informed by a detective of the discovery of a blue Helix petrol container (P3) without its cap on, a red plastic bag (P3A) also near the lift, and the cap of the Helix container (P3B) at the stairs. SP36 directed that those exhibits be left untouched until the forensics team arrived.

[10] SP34 who headed the forensic team arrived at about 2.20pm. He, together with SP33 the photographer, made some preliminary observation of the area near the lift and the area leading to the door of room 321. He found outside the lift a red plastic bag (P3A) in which he found the abovementioned Helix (P3) container and a cigarette butt (P23A). At one of the steps near to the lift SP34 found a plastic bottle cover (P3B) that could fit P3. Not far from this cover he found four cigarette butts but picked up only two (P23B) for DNA profiling. The chemist found that the DNA profile of these two cigarette butts did not match the DNA of the appellant.

[11] This issue of having picked up only two out of the four cigarette butts by SP34 was a substantive ground of appeal by the appellant, as he canvassed that the non-recovery of the other two cigarette butts should be held against the prosecution. In support of his argument, learned counsel for the appellant cited the case of *Abdul Aziz bin Lela v Public Prosecutor* [2011] 5 MLJ 750; [2011] 7 CLJ 1. The brief facts of that case are as follows:

> The appellant was found guilty, convicted and sentenced to death under s 302 of the Penal Code by the High Court judge. His appeal to the Court of Appeal was successful whereupon the conviction was set aside and he was acquitted. The evidence showed that on 28 March 2003 the deceased did not return home. Her child, SP21 saw traces of blood on the deceased's car. The next day from information received, away from the house but next to a bonfire, the burnt body of

the deceased was recovered by the police; apart from some other exhibits the police found two cigarette butts. The chemist testified that the DNA on the two cigarette butts was that of the appellant; that being so the appellant was at the scene of the crime. If not for the break in the chain of evidence of the exhibits, and the flaws in the investigation, the prosecution could have established conclusively his presence at the bonfire where the deceased was burnt. It was divulged that the police had recovered altogether four cigarette butts in the course of the investigation but only three were sent to the Chemist Department. Due to the failure to establish that the chain of evidence had not been broken, let alone why the fourth cigarette butt was not sent for DNA analysis, a relevant matter remained unanswered. There was thus no certainty that the two cigarette butts examined by the chemist supposedly carrying the DNA of the appellant came from the vicinity of the bonfire. Devoid of any other evidence, and with the two cigarette butts under scrutiny, the prosecution thus failed to establish the appellant's culpability hence his acquittal. Even though the prosecution filed an appeal against the Court of Appeal's decision that appeal was withdrawn eventually.

[12] It was the appellant's contention that had the two cigarette butts been recovered and profiled, there was a possibility of the presence of the appellant at the vicinity being uncertain, thus punching a hole in the prosecution's case. As there was no certainty as to whose cigarette butts they were, the appellant urged the court to consider the possibility of them not being his. After scrutinising the facts of *Abdul Aziz bin Lela v Public Prosecutor*, and distinguishing them to the current case, we must reject the argument that the non-recovery of the other two cigarette butts by SP34 or even SP36 would make any difference to the prosecution's case. In the above case, without the cigarette butts, as there was a dearth of evidence, the prosecution had failed to establish his presence at the crime scene.

[13] In the current appeal, even without the cigarette butts, there was an abundance of evidence to establish the appellant's presence at the scene of the murder. Put it in its proper perspective, with the prosecution establishing that the semen on the vagina of the deceased was that of the appellant, the prosecution had successfully established his presence in room 321 at the material time. The cigarette butt (P23A) and the Helix container (P3) were at best corroborative evidence.

[14] SP34 when walking through room 321 had detected the strong smell of petrol. Having seen the deceased's body and the room, SP34 discounted the possibility that she had deliberately hurt herself or had attempted suicide. He testified that the deceased had died before the fire took place. Regretfully we must state that as SP34's view was merely based on his visual assessment of the room vis a vis a medical conclusion made by a pathologist (P28), we cannot accept that opinion.

[15] We now supply our reasons why we prefer SP28's opinion. She was a pathological forensic expert working at Hospital Tengku Ampuan Rahimah, Klang when she performed the post mortem of the deceased. She holds an MBBS degree, a Diploma in Forensic Medicine from Glasgow University in 1995, a Masters in Forensic Medicine also from the same University, a Diploma in Medical Jurisprudence from the Society of Apothecaries London in 1996, and a post graduate Diploma in Forensic Anthropology from Bradford University in 2004. At the time of giving evidence she worked at Hospital Queen Elizabeth, Kota Kinabalu.

[16] Her expert report reads as follows:

> Postmortem examination revealed significant signs of asphyxia with associated acute pulmonary oedema resulting from a form of suffocation suffered by the deceased. In addition, there were evidence of a fire-related death as seen from the first degree burnt marks on the body with minimal soot lining of the upper airways
>
> ... In my opinion, the cause of death is attributable to asphyxia with acute pulmonary oedema as a consequence of the suffocation (with fire-related death) suffered by the deceased.
>
> Cause of death:
>
> 1. (a)Asphyxia with acute pulmonary oedema (due to)
>
> (b) Suffocation (fire-related death).

[17] She concluded that the deceased died of suffocation after the fire was started. In the course of the proceedings she also said the following:

> Contusions maksudnya ada kesan lebam pada otot leher yang dipanggil sternomastoid. Kesan lebam itu boleh disebabkan oleh tekanan objek yang tumpu ...
>
> P11 dirujuk
>
> Jerutan dengan P11 berkemungkinan boleh sebabkan lebam pada otot sternomastoid dengan syarat ia adalah jerutan yang kuat. P11 jika dijerut kuat boleh menghalang pengaliran darah-darah dan udara melalui saluran pernafasan dan seterusnya menyebabkan kelemasan. Kelemasan yang sebabkan pengurangan udara atau ketiadaan oksigen masuk ke badan simati boleh sebabkan kematian.
>
> Adanya lebam di bahagian dalam bibir adalah bersesuaian dengan keadaan bahawa simati telah ditekap dengan bantal. Ia boleh sebabkan asphyxia. Ia juga boleh sebabkan simati di dalam keadaan deep coma.
>
> Jika seseorang itu dalam keadaan deep coma dan tidak dirawat ia seterusnya boleh membawa kematian ...
>
> Pada pendapat saya di dalam kes ini simati alami deep coma akibat daripada asphyxia (kelemasan) yang dialami dan *seterusnya melalui proses kematian. Proses kematian ini dipercepatkan oleh kelemasan akibat asap kebakaran.*

A Orang yang alami deep coma kita boleh lagi kesan kehidupan pada tubuh badan seseorang itu.

[18] Scrutinising the evidence it was obvious that the deceased was in deep coma, caused by strangulation and of having been snuffed by a pillow, and was dying; *the smoke merely hastened her death*. It is based on the above comprehensive reasons that we prefer SP28's expert opinion to that of SP34 who merely held a 'non-medical' view, derived from a cursory sight of the room and the body.

[19] SP12, the chemist who prepared the chemist report (P31) evinced that the DNA profile from the cigarette butt (P23A), the semen from the cotton swab marked J1 and J2 (from rectal and vaginal swab for spermatozoa by SP28) and the blood sample (taken by SP24 at p 308) in the envelope marked 'O' (p 314) came from the same source ie, the appellant (p 83). The profile of the DNA (Deoxyribonucleic Acid) of the two cigarette butts (P23B) did not match each other or even with the deceased's (envelope F) and the appellant's blood (envelope O). We hold the view that even if the other two cigarette butts were recovered and confirmed not to have the DNA profile of the appellant, the outcome would still be the same, as there was sufficient evidence to establish the presence of the appellant in room 321 at the time of the murder. On the other hand if the unrecovered cigarette butts were to hold the appellant's DNA profile they would equally make no difference as it would only have a superfluous effect.

[20] SP19, another chemist testified that after checking room 321 on 4 February 2002, and having analysed the exhibits taken from the scene concluded that the fire had begun from the middle of the bed and the carpet, and then slowly spreading towards the curtains. He opined that the fire was deliberately started with the aid of petrol; there was no evidence of the fire having been started by any electrical fault.

[21] To continue with the chain of evidence, SP5 who was the wife of the appellant was called. Her testimony and explanation made sense of the Helix container (P3) and its nexus with the appellant. According to her, on 3 February 2002 as the appellant's car had run dry, she helped purchase some petrol for him, with the aid of P3. This purchase was confirmed by SP2. She then handed over P3 to the appellant in front of the hotel. She denied any involvement in the murder of the deceased. When recalled, again she categorically denied being at the hotel, by evincing:

Saya tidak pada bila bila masa pada 3.2.2002 berada di Hotel Panmour Villa.

[22] Her testimony anticipated any accusation of failure by the prosecution

to call material witnesses in the light of the fact that not only SP4 knew of the appellant's relationship with the deceased, as the deceased had confided in her, but also the availability of SP5 as a witness. SP5 admitted that the appellant had a close relationship with the deceased but despite being upset with the deceased SP5 denied of having any intention to kill her.

[23] With the elimination of any suspicion of SP5's possible involvement in the murder at the stage of the prosecution the only suspect left was the appellant; *her denial not dented, it also exculpated her of being involved in the murder at the defence stage despite the appellant's accusation of her complicity in the murder*. With SP5 not being at the vicinity of the murder, the implication is that only the appellant was in the room with the deceased, and with the opportunity to carry out his murderous act.

[24] This fact of being alone with the deceased and the last person to witness the deceased alive is supported, as clarified earlier, by SP8's testimony. The combined effect of the evidence of the appellant paying the bill and handing over a burnt slot key, and it being the only key to the room, is that the appellant had closed the room's account and thus handing over a supposedly empty room back to the hotel. As he had taken the only key to the room, and leaving the deceased to die in the room, in all logic the appellant must be taken to have been the last person to see the deceased alive.

[25] To close up any loose ends the prosecution called SP6. He testified that on 7 February 2002 at about 12 noon ie, four days after the murder, the appellant had sold three sets of rings, a bracelet, and a pair of earrings to him for RM647. The receipt book which contained the appellant's name was seized from this witness. This witness testified that the appellant had told him that these valuables were that of his girlfriend. All the rings, P7, P8 and P9 were identified by the deceased's sister (SP11). She also testified that P8, which was a diamond ring, was given to the deceased as a wedding present by the previous husband while the other two had been hers for a long time. From the testimony of SP6, a mental picture of the appellant, being the only person in room 321, stripping the deceased of her valuables when in a state of deep coma could be conjured.

ANALYSIS OF EXHIBITS

[26] At the risk of repeating the evidence, the chain of evidence as to how the petrol was brought into the hotel was explained by the testimony of SP5, when she testified that she handed the Helix container (P3) filled with petrol, to the appellant outside the hotel. This container was identified by her in the course of the proceedings. Who else could have brought the Helix container which contained the petrol to the hotel if not the appellant? The smell of petrol that

A pervaded the room as testified by SP34, corroborated by the presence of the container, confirmed the prosecution's case that it must have been the petrol contained in P3 that was used to set the room aflame.

B **[27]** It is now accepted by courts that bodily fluid, tissues, semen, saliva etc obtained from the crime scene may be established to connect an accused person to the crime (*Criminal Trial Advocacy for the Defence* by Hisyam Abdullah @ Teh Poh Teik; *Public Prosecutor v Loo Seng Yip* [2004] 8 CLJ 496; *Hanafi bin Mat Hassan v Public Prosecutor* [2006] 4 MLJ 134; [2006] 3 CLJ 269). The C profile of the DNA on the cigarette butt (P23A), picked up nearby to room 321, and which matched the DNA of the semen from the cotton swab, confirmed to match that of the appellant, not only confirmed his presence in that room before her death but also of their close relationship. The semen swab established once and for all that their relationship had transcended into a sexual D one. In fact we are satisfied that with the appellant's active semen found on the person of the deceased, the additional evidence of the cigarette butt needed to establish his presence in the room at the material time, was unnecessary.

E **[28]** Much court time was taken up to consider whether a cautioned statement (P41) recorded from the appellant was admissible or not; the High Court eventually held that it was voluntarily given by the appellant. It was still held admissible by the High Court and the Court of Appeal despite both courts admitting that there were some errors found on it. Perusing the cautioned statement, when asked whether he wanted to say anything, he had answered no F ('tidak') but further down below in the document, his answer went against the earlier reply. Having scrutinised P41, we consider it as an unsafe piece of evidence and hence inadmissible. So, without P41, would the learned judge, and for that matter the Court of Appeal, still call the defence? The answer is that regardless of the elimination of this cautioned statement as part of the G prosecution's evidence the learned judge would still have called the defence. This is in view of his remarks when in clear terms said:

> Sekalipun saya menerima masuk P41 tetapi saya tidaklah bergantung kepadanya. Ia hanya setakat sebagai keterangan sokongan sahaja. Itu pun ia tidaklah bermakna pihak pendakwaan gagal membuktikan kesnya tanpa P41 itu.

H

[29] It is trite that sufficiency of evidence to establish a prima facie case depends on the quality of evidence adduced by the prosecution rather than quantity.

I

[30] The last question for our consideration is whether his murderous act falls squarely within the provision of murder. Section 300 of the Penal Code reads:

> Except in the cases hereinafter excepted, culpable homicide is murder —

(a) if the act by which the death is caused is done with the intention of causing death; A

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

B

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid. C

[31] The evidence relied upon by the prosecution to establish that his acts would fall under any of the sub-clauses, depends very much on the testimony D of SP28 and her medical report. Her evidence as adduced showed that prior to the death, there were clear signs of strangulation, possibly with P11 (a towel) and forceful closure of her mouth, physical acts that led to the flow of blood supply to the airway being cut off. SP28 rejected any suggestion that the deceased was strangled by bare hands. The bruises at the mouth area indicated E that it had been forcefully covered by an object like that of a pillow. She had in no uncertain terms said, with or without the smoke the deceased would still have died. The cause of death was attributable to asphyxia with acute pulmonary oedema as a consequence of the suffocation (with fire-related death). The minimal soot lining at the upper airways, which must have come F from the smoke, means that she was still alive when the fire was lighted. The smoke merely hastened her death.

[32] As it is difficult for any court to know the mind of an accused person, in order to know of his intention or whether he had knowledge of the outcome of G his act, much therefore would depend on inference. Assistance may be sought by a court from the type of weapon used, the excessive force applied, the vital part of the body befallen with injury, and even the eventual outcome of the act of the perpetrator (*R v Winner* (1995) 79 A Crim R 528). Surely when a gun is brandished during a robbery it may be inferred that the robber is ready to kill H when confronted by anyone. Or for that matter murder must have been in the mind of the killer when he stabs a person say, 24 times. At the other extreme end an intention to kill can be evidenced even by a single act particularly on a vital part of the body (*Ranwilage Suren Sanjeewa Fernando v Public Prosecutor* [1998] 3 SLR (R) 269; *Criminal Law in Malaysia and Singapore* (2nd Ed, I Stanley Yeo).

[33] For purposes of s 300(b) having sifted the evidence, we hold the view that the appellant must have known that by strangling the neck of the deceased

with the towel or even covering her mouth with a pillow (ingredient of intention of causing such bodily injury), the deceased would suffocate and die (ingredient of likely to cause death of the deceased) (*Public Prosecutor v Hoo Chee Keong* [1997] 4 MLJ 451; [1997] 2 CLJ Supp 357; *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237).

[34] To fall under s 300(c) of the Penal Code, likewise certain pre-conditions must be satisfied viz the appellant intended to cause bodily injury, the injury did take place, and the inflicted injury was sufficient in the ordinary course of nature to cause death. The intention to cause that bodily injury needless could be read from the nature and seriousness of the injury caused. In the current case, the injuries were multiple and inflicted on vital areas with great force, causing the deceased to suffer asphyxia and falling into deep coma inevitably leading to slow death. The act of burning the room (which would get rid of the body, was the *coup de grace*, as death to the deceased was a certainty, let alone disfigurement beyond recognition), was sufficient to establish the required statutory intention.

[35] Could the offence, with the facts as they are, have fallen under that of s 299 of the Penal Code? Having perused the evidence the answer has to be in the negative. Even though ss 299 and 300 of the Penal Code equally contemplate death, the scenario here is that the degree of risk to death is past that of being the likely result but the most probable result, and the appellant knew death would ensue (the subjective ingredient). Raja Azlan Shah FCJ (His Royal Highness, the Sultan of Perak) in *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 in clear terms had said:

> ... Whether the offence is culpable homicide or murder, depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder.

(See also *Chung Kum Moey v Public Prosecutor* [1967] 1 MLJ 205 (PC); *Knowledge of the Degree of Probability of Causing Death* by T Vijayandran [2012] 1 MLJ xxviii)

[36] To conclude, the violent acts of the appellant therefore would fall squarely under sub-cll (b) or (c) of s 300 of the Penal Code, in that the prosecution had established that the appellant had committed culpable homicide amounting to murder. Further, even though the prosecution depended very much on circumstantial evidence, and despite the inadmissibility of P41 ie, the cautioned statement, we likewise find that it had successfully adduced sufficient evidence through witnesses' testimony and physical evidence (exhibits) collected in the course of the police investigation. The prosecution had established that the appellant had met the deceased at the hotel and had a sexual liaison there, and with the benefit of being the last person

to be with her had strangled the deceased. He later started a fire in the room. The strangulation, asphyxia, and manner of her death were confirmed by SP28. We therefore conclude that the learned judge had decided correctly that a prima facie case had been established thus justifying calling the defence.

DEFENCE STAGE

[37] At the defence stage the appellant gave a totally different version to that given by SP4. The latter, at the prosecution's stage had testified that the deceased told her that the appellant had contacted her and wanted to meet up. The appellant on the other hand said it was the deceased who contacted him. The High Court preferred the testimony of SP4 as her story had been left unchallenged at the prosecution's stage. Regardless of who called whom, the inescapable fact was that the appellant came to the hotel, and met the deceased there; culminating with her death at his hands.

[38] The appellant's only serious defence was his allegation that his wife (SP5) had caused the death. He told in some length of SP5 coming to the hotel and causing a heated argument there with him and the deceased. He was supposed to have left the hotel simultaneously with SP5, she returning home and he proceeding to a pharmacy to buy some medicine for his asthma. There he received a call from SP5 to return to room 321. He returned to the room and it was SP5 who opened it; inside the room he saw the deceased on the floor. There was no evidence adduced by the appellant as to how she could have access to that room, in the light of there being only one key for it, and the appellant having just witnessed a supposedly heated argument between SP5 and the deceased. This makes the story by the appellant of SP5 waiting in that room rather far-fetched. He further testified that SP5 told him that the deceased was dead and the body had to be disposed of. He also felt for the pulse but found none. The implication is that it was the wife who strangled the deceased. His wife then left with the Helix container to buy petrol. After her return to the room both of them carried the deceased to the bed followed by SP5 pouring the petrol on the deceased. She then instructed the appellant to light the petrol and thereafter left.

[39] His attempt to blame SP5 came out rather weakly as at the stage of the prosecution he never posed any question that could have implicated her directly to the murder. It is uncontroverted that SP5 had testified that she handed over the petrol to him in a shop called Sykt Dragon Sound, located outside the hotel, and hence never entered the hotel. At no stage of his evidence did he manage to rebut the evidence of the prosecution that he was the last person to see the deceased alive, in light of the damning evidence of SP8 and SP5, which pinned him down. His defence was further weakened when he failed to stand rigorous probing. Twice (at *Jld* 5 pp 575 and 584) the appellant

had admitted that he personally set the room on fire after SP5 had left the room. At p 575 he said:

> Faridah ambil P3 dan beliau keluar tinggalkan bilik ... *Selepas 10 minit saya nyalakan api dengan mancis*.

[40] With his admission, it was beyond reasonable doubt that he was the last person to see the deceased alive. Even without his admission, we do not accept his accusation that SP5 was in the room with him prior to the fire, as we accept her evidence that she never entered the hotel. At p 584 the appellant's story became more untenable as he said:

> Dia juga adalah isteri saya. Saya tidak mahu dia ditangkap. *Juga kerana sayalah orangnya yang membakar bilik*.

[41] To allege that SP5 killed the deceased, on the premise that he saw the deceased on the floor followed by her supposed statement that the deceased was dead, or said he failed to detect any pulse, simply could not stand the test of SP28's post mortem's finding. By evincing that he checked the pulse of the deceased it must imply that he had some medical knowledge. In light of the fact that the deceased died only after the fire, and by testifying that he found no pulse, he had fallen into his own trap and exposed his capability to lie in court. Once his veracity become doubtful then his evidence must be scrutinised critically (*Mohamed Ali v Public Prosecutor* [1962] 1 MLJ 230; *Syed Abu Bakar bin Ahmad v Public Prosecutor* [1984] 2 MLJ 19). His admission that he started the fire unwittingly destroyed any semblance of a possible defence.

[42] Having gone through a maximum evaluation exercise of the evidence, and with such overwhelming circumstantial evidence, we find no error in the High Court's finding that the prosecution had established a case beyond reasonable doubt against the appellant (*Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85). In a gist the appellant had failed to cast any reasonable doubt on the prosecution's case ie, the burden imposed on him (*Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1; [1996] 4 CLJ 597; *Mohamad Radhi Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 1 CLJ Rep 311).

[43] The finding of guilt, the conviction and mandatory sentence of death by hanging are affirmed and we therefore dismiss this appeal. The order of the High Court is affirmed.

Appeal dismissed; conviction and sentence affirmed.

Reported by Dzulqarnain Ab Fatar